No. 77-1486

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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JOSE GUADALUPE GARZA, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. 5a).

## JURISDICTION

The judgment of the court of appeals was entered on February 21, 1978, and a petition for rehearing was denied on March 30, 1978. The petition for a writ of certiorari was filed on April 18, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Drug Enforcement Administration's good faith pretrial destruction of the heroin that petitioner was charged with distributing deprived him of a fair trial.

2. Whether a pre-indictment delay of 44 months violated petitioner's right to due process.

## STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiracy to distribute heroin, distribution of heroin, and of two counts charging the use of a telephone in facilitating the distribution of heroin, in violation of 21 U.S.C. 846, 841(a)(1), and 843(b). He was sentenced to a total of 30 years' imprisonment to be followed by a ten-year special parole term (Pet. 3-4). The court of appeals affirmed (Pet. App. 5a).

In August 1973, a government informant in Dallas asked Efrain Cavazos of McAllen, Texas, whether he could sell the informant some heroin; since Cavazos had none, he contacted Juan De La Cruz and petitioner (Tr. 89-93). The informant reported his negotiations to the Drug Enforcement Administration (Tr. 182). Thereafter, DEA Agent Lunt met with Adolio Cruz, Juan De La Cruz, and petitioner in Dallas to discuss a sale of a kilogram of heroin (Tr. 133-140); further negotiations between Lunt and petitioner took place over the telephone on August 21 and 22 (Tr. 190-196). Then, on September 4, 1973, the government informant notified Lunt that the McAllen group would not deliver heroin to Dallas as Lunt had expected (Tr. 200).

Accordingly, DEA agents in McAllen took over the investigation (Tr. 200-201). The informant arranged for the agents to meet with De La Cruz and Cavazos, who agreed to sell the agents heroin (Tr. 259-260). On September 6, 1973, De La Cruz, Cavazos, and Luis Torres diluted the heroin with brown sugar (Tr. 126). Then De La Cruz and the informant delivered approximately a kilogram of the heroin to the agents (Tr. 271). De La Cruz, Cavazos, and Torres were arrested (Tr. 125, 271). The agents were advised that the man who had supplied the heroin would be waiting in a truck at a Sears parking lot in McAllen to receive payment, but when they reached the lot they found no one answering this description (Tr. 287-288).



Cavazos, De La Cruz and Torres were convicted of offenses involving this sale in October of 1973, and on July 16, 1974, the heroin from that sale was destroyed at the DEA lab in Dallas, although the reports of the DEA chemist's analysis of the substance were preserved (Tr. 334).

The DEA agents in McAllen had no dealings with petitioner, and DEA did not establish the connection between the McAllen transaction and the incomplete Dallas transaction in which petitioner had figured (Tr. 35-36). In March of 1977, DEA agents first obtained information from two sources that petitioner had been the supplier of the heroin who had waited in the Sears parking lot (Tr. 27-32, 318). Petitioner was indicted in April 1977 and tried in July 1977.

Prior to trial, petitioner moved to have his own expert examine and analyze the heroin (Tr. 6-7). The district court granted the motion, stating that petitioner should inform the government of the identity of the chemist to whom the sample of the heroin should be sent for examination (Tr. 7). At this time neither party was aware that the heroin had already been destroyed. Petitioner never gave the government the name of a chemist to whom the heroin should be sent (Tr. 334). Prior to trial the government did, however, send petitioner copies of the DEA chemist's reports confirming that the substance was heroin (Tr. 333). At trial, after the DEA chemist testified—without objection from petitioner—that he had analyzed the substance delivered to the agents in the September 1973 transaction and determined that it was heroin (Tr. 328-332), petitioner's counsel then informed the court that he could not recall whether the government

had ever complied with his discovery motion seeking a sample of the heroin for testing (Tr. 333). Counsel for the government stated that the heroin had been routinely destroyed in July of 1974 (Tr. 333-334). Petitioner then objected to the chemist's testimony and did not cross-examine the chemist (Tr. 333-335).

**ARGUMENT**

1. Petitioner contends (Pet. 5-6) that the destruction of the heroin before his expert could independently test it deprived him of a fair trial. This argument is without merit.

When evidence relevant to a criminal case is destroyed or lost by the government before trial, a defendant's conviction will not be reversed absent a showing of bad faith on the part of the government or prejudice to the defendant. *Government of the Virgin Islands* v. *Testamark*, 570 F. 2d 1162 (C.A. 3); *United States* v. *Picariello*, 568 F. 2d 222 (C.A. 1); *United States* v. *Heiden*, 508 F. 2d 898, 902 (C.A. 9); *United States* v. *Henry*, 487 F. 2d 912 (C.A. 9); *United States* v. *Sewar*, 468 F. 2d 236 (C.A. 9), certiorari denied, 410 U.S. 916.

Petitioner does not contend that the government acted in bad faith (see Pet. 4), and the record furnishes no support for such an inference. The heroin was destroyed after the successful prosecution of all the participants in the sale that were initially known to the government and before additional evidence came to light that warranted petitioner's prosecution.

Moreover, the record discloses that petitioner suffered no prejudice as a result of the destruction of the heroin, since he had never made any effort to obtain a sample of the heroin for independent testing prior to trial. Petitioner offers no reason to believe that the substance was not in fact heroin, as the DEA's tests



indicated. To the contrary, the other evidence in the case corroborated DEA's identification of the substance. Before the heroin was delivered, co-conspirator Torres had tested it to determine if it was satisfactory by injecting himself (Tr. 522-523), and the DEA agents testified that they had field tested it three times with positive results before they accepted delivery and made the initial arrests (Tr. 269-271).

2. Petitioner also contends (Pet. 6-8) that the 44-month pre-indictment delay violated his right to due process. But, as this Court held in *United States* v. *Lovasco*, 431 U.S. 783, 796, "* * * to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." Petitioner urges (Pet. 7) that this case is distinguishable from *Lovasco* because there was no evidence that there was a continuing investigation after the arrest and conviction of Torres, De La Cruz, and Cavazos; he argues that the government "either had a case then or they did not." To the contrary, however, the government's evidence showed that petitioner's connection with the sale in question did not become clear until March of 1977, when two persons told a DEA agent about petitioner's involvement. The agent who learned of petitioner's involvement from these sources testified that the delay in petitioner's prosecution did not result from efforts to gain any tactical advantage (Tr. 36). The district court credited this testimony and denied petitioner's motion to dismiss on the grounds that the pre-indictment delay was investigative in nature (Memorandum Order of July 11, 1977, reprinted as Appendix C to the government's brief in the court of appeals). Additionally, the district court also found that petitioner's general allegations of his impaired memory were insufficient to establish that any substantial prejudice resulted from the delay (*ibid.*).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1978.